AXA AFFIN ASSURANCE BHD

v.

NATURAL AVENUE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH IBRAHIM J
[JUDICIAL REVIEW APPLICATION NO: R2-25-175-2003]
26 FEBRUARY 2007

ARBITRATION: *Award - Setting aside - Allegation of errors in law - Arbitrator allowed respondent's claim for indemnification under a private car insurance policy for loss of vehicle due to theft - Whether driver of vehicle an agent of respondent - Negligence - Vicarious liability - Standard of care - Whether burden of proof on applicant to prove recklessness - Arbitration Act 1952, ss. 23, 24(2)*

INSURANCE: *Motor insurance - Indemnification - Application to set aside arbitrator's award allowing respondent's claim for indemnification under a private car insurance policy for loss of vehicle due to theft - Errors in law - Whether driver of vehicle an agent of respondent - Negligence - Vicarious liability - Standard of care - Whether burden of proof on applicant to prove recklessness - Arbitration Act 1952, ss. 23, 24(2)*

AGENCY: *Liability of principal - Negligence - Application to set aside arbitrator's award allowing respondent's claim for indemnification under a private car insurance policy for loss of vehicle due to theft - Errors in law - Whether driver of vehicle an agent of respondent - Vicarious liability - Standard of care - Whether burden of proof on applicant to prove recklessness - Arbitration Act 1952, ss. 23, 24(2)*

TORT: *Negligence - Vicarious liability - Application to set aside arbitrator's award allowing respondent's claim for indemnification under a private car insurance policy for loss of vehicle due to theft - Errors in law - Whether driver of vehicle an agent of respondent - Standard of care - Whether burden of proof on applicant to prove recklessness - Arbitration Act 1952, ss. 23, 24(2)*

This was the applicant's application under ss. 23 and 24(2) of the Arbitration Act 1952 against the decision of the arbitrator in favour of the respondent pertaining to the respondent's claim against the applicant to be indemnified under a private car insurance policy for loss of a vehicle due to theft. The applicant submitted that the arbitrator had erred in law and in fact in holding that the driver of the insured vehicle, one Abdul Aziz, an employee of the respondent,

was not an agent of the respondent at the time of the loss when he was clearly its servant or agent in control of the vehicle. The applicant also contended that the arbitrator, in deciding that Abdul Aziz's act, on the facts, merely amounted to negligence and not recklessness, had erred in law in finding that the burden of proof was on the applicant/insurers to prove "recklessness" when the authorities state that the test the court had to consider was whether the insured or its agent acted "reasonably" or had "deliberately courted danger".

Held (allowing the application, and setting aside the arbitrator's award):

(1) It was stated in the form reporting the loss of the motor vehicle that Abdul Aziz was the servant or agent of the respondent. In fact, the respondent, in reply to the question of whether the driver was engaged upon the company's business with the respondent's consent, conceded that the answer was in the affirmative. Thus, there was an error on the face of the law to hold that Abdul Aziz did not act as an agent for the respondent and that the respondent was not vicariously responsible for his negligence from the same time the arbitrator held as a finding of fact that Abdul Aziz was negligent. The arbitrator, applying the usual tortuous standard for negligence, clearly felt that Abdul Aziz had failed to take reasonable care. Failure to take reasonable care is equivalent to failing to take reasonable precautions. As such, the standard in *Devco Holder Ltd & Burrows & Paine Ltd v. Legal & General Assurance Society Ltd* should have been applied and not the "recklessness" standard in *Fraser v. BN Furnam (Productions) Ltd, Miller Smith & Partners (Third Party)*. By following the latter, the arbitrator clearly erred in law. As to the issue of recklessness, the arbitrator, in holding that the burden of proof was on the applicant to prove "recklessness", had clearly made an error in law on the face of the record that was clearly wrong and unsustainable in insurance law. He should have instead considered whether the insured or its agent had acted "reasonably" or had "deliberately courted danger", in line with *Devco (supra)* which was on all fours with the facts of the present case. *Devco Holder Ltd & Burrows & Paine Ltd v. Legal & General Assurance Society Ltd* (foll); *Fraser v. BN Furnam (Productions) Ltd, Miller Smith & Partners (Third Party)* (dist).

Case(s) referred to:

Devco Holder Ltd & Burrows & Paine Ltd v. Legal & General Assurance Society Ltd [1993] 2 Lloyd's Rep 567 ***(foll)***

Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***

Fraser v. BN Furnam (Productions) Ltd, Miller Smith & Partners (Third Party) [1967] 2 Lloyd's Rep 1 ***(dist)***

Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd [2003] 1 CLJ 103 CA ***(refd)***

Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 23(1), 24(2)
Contracts Act 1950, s. 135
Insurance Act 1963, s. 44A

For the applicant - Tunku Farik Ismail; M/s Azim Tunku Farik & Wong
For the respondent - Paul Chua Liang Hong; M/s LH Chua

Reported by Suresh Nathan

JUDGMENT

Wan Afrah Ibrahim J:

[1] This is an application by the applicant under ss. 23 & 24(2) of the Arbitration Act 1952 on the basis that there is a clear error on the face of the law.

Background Facts

[2] The facts of the case are by way of statement of agreed facts which are as follows:

[3] The applicant issued a Private Car Comprehensive Policy No. 111/047114/19/06 (hereinafter referred to as "the said policy") to the claimant/respondent for the period of 18 June 2001 to 17 June 2002 in respect of the vehicle bearing registration number KT 638 Q (hereinafter referred to as "the said vehicle") against loss and damage for the sum of RM288,000.

[4] By Section A cl. 1(f) of the said policy the applicant covenanted, *inter alia*:

A 1. We will cover You if Your Vehicle is damaged or lost in the following circumstances:

(f) by burglary, housebreaking or theft.

B **[5]** On 7 August 2001 at sometime between 12-12.30pm, the driver one Abdul Aziz bin Othman (hereinafter referred to as "the driver") had driven the said vehicle to SRK Chung Hua No. 2 which is located near the Harbour View Hotel, Jalan Padungan, to pick up the children of the Director of the claimant.

C **[6]** Upon arrival at the school, the driver had parked the said vehicle a parking space next to a Karaoke Lounge "No. 99" and in front of Harbour View Hotel opposite the school.

D **[7]** At 1pm the driver upon seeing the Director's children out of their classes, had left the said vehicle with the engine running and the airconditioning on and walked across the road to the school gate to wait for the children to accompany them across the road. The school gate was at a distance of about 15-20 metres away from the said vehicle.

E **[8]** As the driver and children were walking back towards the direction of the said vehicle a few minutes later, the driver realized that the said vehicle was missing.

F **[9]** The respondent's claim against the applicant is to be indemnified under the policy for the loss of the vehicle due to the theft.

G **[10]** The applicant rejected the respondent's claim and repudiated liability on the ground that the respondent breached Condition 7(c) of the policy. By consent both parties referred the dispute for arbitration before the sole arbitrator, the learned Dato' Sri George K.S. Seah.

H **[11]** The issue before the learned arbitrator is whether in all the circumstances of the case, the applicant is entitled to rely on condition 7(c) of the Private Car Comprehensive Policy No. 111/047114/19/06 to repudiate liability for the loss of vehicle no. KT638Q. The learned arbitrator gave a decision in favour of the respondent and held that the applicant is liable under the policy to indemnify the respondent for the loss of the vehicle due to the theft.

I

The Award

[12] The interim award at exh. AS1 basically held that the said Abd Aziz who was the driver of the said vehicle was not the agent because it was the insured (company) personally who had to take reasonable precaution. The learned Arbitrator also held that the act of the driver did not amount to recklessness in the circumstances of the case *albeit* it might amount to an act of negligence.

[13] The applicant is now submitting before this court that there is error of law on the face of the law. Before coming to decision I am aware of the principle governing an application to set aside an arbitrator's award under s. 23(1) and s. 24(2) of the Arbitration Act 1952 namely referring to the case of *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788, *Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd* [2003] 1 CLJ 103.

[14] As I have started earlier the applicant is making the application on the basis that the learned arbitrator has committed an error of law and can be set aside. Reliance is made to the case of *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1 where in that case it was held that the learned arbitrator placed a very narrow and restrictive interpretation on s. 44A.

[15] In the case before me, it was argued that the learned arbitrator made a clear error which is unsustainable in insurance law in interpreting the effect of the Condition 7C of the Private Car Insurance Policy.

[16] As can be seen clearly that the policy can only be operative if:

> (c) You have taken all reasonable precautions to safeguard your vehicle from loss or damage.

[17] Learned counsel for the applicant argued that the learned arbitrator erred in law and in fact in holding that the driver of the insured vehicle one Abdul Aziz, an employee of the respondent was not an agent of the respondent at the time of the loss when he was clearly their servant or agent in control of the vehicle. It was also submitted that the learned arbitrator allowed the respondent to approbate and reprobate the constraint ie, that the driver was their agent for the purpose of the claim but not their agent for the purpose of breaches of the condition.

[18] As such it was submitted that the learned arbitrator is clearly erroneous in law when he stated at para 10.3 of his interim award that:

> Moreover, it is the insured personally who must take reasonable precautions and in my opinion, it would be wrong to assume that the driver was the agent of the insured and would therefore take reasonable precautions pursuant to Clause 7(c) of the Policy, in the absence of credible evidence.

[19] On the facts of our case Abd. Aziz by the respondent/claimant's own admission is their servant and/or agent in control of the vehicle at the time it was stolen. By virtue of the fact that he is their servant and/or agent, counsel for the applicant argued, he is duty bound to comply with all terms and conditions of the policy. His failure to comply with policy conditions or his breach of them would bind the respondent/claimant and would entitle the applicant/insurer to repudiate liability.

[20] Another point raised by the applicant/insurer is that the learned arbitrator erred in law in holding that the burden of proof was on the applicant/insurers to prove "recklessness" when the authorities state that the test that the court had to consider was whether the insured or their agent acted "reasonably" or had "deliberately courted a danger".

[21] Learned counsel discussed at great length the case of *Devco Holder Ltd & Burrows & Paine Ltd v. Legal & General Assurance Society Ltd* [1993] 2 Lloyd's Rep. 567.

[22] It was argued that Condition 7(c) in our present case and Condition 2 in the above case are similar. It was highlighted to the court that in the said case the defendants also contended by leaving the car unlocked with the key in the ignition in a public place, the driver failed to take all reasonable steps to protect the car against loss with the general condition 2 and that they are liable to repudiate liability.

[23] Simply put the applicant alleged that based on the facts of our case which is on all fours with the case of *Devco Holder Ltd*, the learned arbitrator made a clear error in law as his decision is against the weight of legal precedent and authorities.

[24] The learned respondent's counsel on the other hand based on para 8.1.1. of the award the learned arbitrator had made a finding of facts after considering all the relevant document. The findings of facts by the learned arbitrator are as follows:

a) I find and adjudge that Abdul Aziz bin Othman was the driver

   i) of the insured vehicle, Toyota HDJ101 Land Cruiser, registration plate No. KT 638 Q when the theft of the said vehicle was discovered.

   ii) That the said driver was not the agent of the said vehicle because the insured (claimant) personally who must take reasonable precaution (*Fraser*'s case).

   iii) That the theft took place a few minutes after the driver left the said vehicle unattended.

   iv) That the driver walked a short distance of 15 to 20 meters across the road to fetch the children from the school gate and accompanying them across the road back to the said vehicle,

b) I find and adjudge that neither the driver nor the Respondent

   i) or any of its Director or Directors recognized the existence of the danger, that the said vehicle could be stolen if left unattended, with the engine running even for a few minutes.

   ii) No satisfactory evidence by way of a Police Report (apart that of the driver herein) has been tendered by the Respondent that similar incident had taken place in the past.

c) I find and adjudge that the act of the driver did not amount

   i) to recklessness, in the special circumstances of this case, *albeit* it might amount to an act of negligence.

[25] Reference was made to the case of *Future Heritage* where the Court of Appeal had occasion to say "... on findings of facts, an arbitrator is the sole judge. Further whether he drew wrong inference of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award ..."

[26] It was further argued that the learned arbitrator had correctly applied the principles enunciated by Diplock LJ in *Fraser v. B.N. Furnam (Productions) Ltd., Miller Smith & Partners (Third Party* (CA) [1967] 2 Lloyd's Rep. 1

> In *Fraser*'s case, the following condition is found in the policy:
>
> "The Insured shall take reasonable precautions to prevent accidents and disease."
>
> This is what Diplock LJ has to say in Fraser:
>
> "The first point to consider is the question of construction of that condition ... There are three considerations to be borne in mind on the wording of this condition. (1) *It is the insured personally who must take reasonable precautions. Failure by an employee to do so, although the employer might be liable vicariously for the employee's negligence or breach of statutory duty would not be a breach of the condition. ...*"

[27] It was ventilated that mere negligence on the part of the insured is not sufficient to constitute a breach of the duty imposed by the terms of the policy. The insured must have acted recklessly, that is, he must have deliberately courted a danger the existence of which he had recognized by failing to take the necessary measure to avoid the danger.

[28] Another point put forward by counsel for the respondent/claimant was that the learned arbitrator did carefully consider the letter of repudiation and this is what the learned arbitrator says:

> If the Vice President of the Applicant had intended to apply the judgment of Diplock LJ in the *Fraser*'s case, the Vice-President had omitted to include a very material part of the said judgment in the letter of repudiation to the Respondent, ie, "the existence of which he recognizes". (Paragraphs 10.1 to 10.1.1 of the Award)

[29] The learned arbitrator is also entitled to interpret and hold that the non-inclusion of the words "the existence of which he recognizes" in the grounds for repudiation of liability under Condition 7(c) of the policy is fatal to the applicant's case.

[30] To summarize, it is correct for the arbitrator to make findings in his award that:

a) It is the insured personally who must take reasonable precautions. Failure by an employee to do so, although the employer might be liable vicariously for the employee's negligence or breach of statutory duty would not be a breach of the condition.

b) The onus is on the applicant to prove that the respondent has breached Condition 7(c) of the policy and the applicant has failed to discharge the burden.

c) That in the special circumstances of the case, the act of the driver in leaving the insured vehicle unlocked and unattended with the keys in the ignition and the engine running, did not amount to recklessness, *albeit* it might amount to negligence.

d) The burden is on the applicant to prove that the driver is reckless, that is, he must have deliberately courted a danger the existence of which he had recognized by failing to take the necessary measures to avert the danger, and this the applicant has failed to do.

e) It is fatal to the applicant's case that the letter of repudiation whilst alleging that the driver is "reckless" and "deliberately courting danger" did not include the words "the existence of which he recognizes.

[31] As such there is no error of law on the face of the award and that the learned arbitrator did not commit any misconduct in the arbitration proceedings.

Decision

[32] The first issue that this court has to decide is whether the learned arbitrator committed an error of law in holding that the driver of the insured vehicle one Abdul Aziz who was an employee of the respondent was not an agent of the respondent. It is indeed ironical that in the form for report on motor vehicle loss it is stated that Abdul Aziz is the servant or agent of the respondent. In fact it was conceded by the respondent in reply to the question as to whether the driver was engaged upon the company business, the answer was in the affirmative and that with the respondent's consent. In fact if we were to examine s. 135 of the Contracts Act it was defined that an "agent" is a person employed to do any act for another. The person for whom such act is done is called the

principal. In this case, to my mind there is an error on the face of the law to hold that Abdul Aziz did not act as an agent for the respondent and that the respondent was not vicariously responsible for his negligence from the same time the learned arbitrator held as a finding of fact that Abdul Aziz was negligent.

[33] As to the heavy reliance of *Fraser*'s case by the learned arbitrator I would agree with counsel for the applicant that since *Fraser*'s case involved liability for injury to person and involved employer's liability cover, Lord Diplock stand should be confined only to liability cover and not for example theft cover. A reference to the book by Dr. Malcome Clarke has this to comment ie, "In spite of this decision, the Diplock reference to the object of the insurance does invite a distinction between different kinds of insurance or even between different sections of the same policy. Within the bounds of a comprehensive motor policy, there may well be more than one level of care required of an insured. Whereas it is axiomatic that the negligence of the insured is covered as regards injury caused to third parties, and any clause to the contrary may be repugnant to public policy, the insured may still be required to exercise reasonable care to safeguard the vehicle from theft or damage – as an exception to the liability of the insurer. ..."

[34] To my mind *Fraser*'s case should be confined to its facts since it pertains to an employer's liability policy where persons were injured and not a comprehensive motor policy on other property insurance involving theft. I am also of the view that an insured should be required to exercise reasonable care to safeguard the vehicle for that to be an exception to the liability of the insured. In our case, the insured should not be covered if he deliberately "courts danger" as decided in *Devco*'s case.

[35] The learned arbitrator has held as a fact that Abdul Aziz was negligent (the award p. 7), he clearly felt that Abdul Aziz had failed to take reasonable care applying the usual tortuous standard for negligence. Failure to take reasonable care is equivalent to failing to take reasonable precautions. As such, *Devco*'s case standard should have been applied and not *Fraser*'s case which is the "recklessness" standard. By following the latter case, the learned arbitrator clearly made an error of law on the face of the record.

[36] As to the issue of recklessness, I agree with counsel for the applicant that in holding that the burden of proof was on the applicant/insurers to prove "recklessness" the learned arbitrator clearly made an error in law on the face of the record which is clearly wrong and unsustainable in insurance law. He should have instead considered whether the insured or their agent acted "reasonably" or had "deliberately courted a danger" in line with what was stated by Malcolm Clark and applied the decision of *Devco*'s case which is on all fours with the facts of the present case.

[37] Based on the above reasons, I hereby grant order in terms of the application that the arbitrator's award be set aside with costs.